

Served: July 10, 1992

NTSB Order No. EA-3609

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 19th day of June, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

SE-10580

v.

DOUGLAS JACKSON COOMBS,

Respondent.

OPINION AND ORDER

The respondent has appealed from an order issued by Administrative Law Judge Joyce Capps that granted a motion by the Administrator to dismiss as untimely the appeal respondent filed in this proceeding to contest the revocation of his commercial pilot certificate.¹ For the reasons discussed below, we will deny the appeal and affirm the dismissal order.²

¹A copy of the law judge's order, served February 26, 1990, is attached.

²The Administrator has filed a reply opposing the appeal.

Under Section 821.30(a) of the Board's Rules of Practice, 49 CFR Part 821, an airman seeking Board review of "an order of the Administrator amending, modifying, suspending, or revoking a certificate" must file an appeal from the order "with the Board within 20 days from the time of service of the order...."³ In his appeal, respondent urges us to reverse the law judge's determination that his October 2, 1989 appeal from a June 27, 1989 revocation order was not timely.⁴ For the reasons discussed below, we decline to do so, for we agree with the law judge that valid constructive service of the revocation order on respondent was effected by the Administrator in this case.

There is no dispute that respondent received from the Administrator on May 3, 1989 a copy of a Proposed Notice of Certificate Action, issued April 26 and sent to his residence address of record by certified mail, that set forth the Administrator's reasons for believing that respondent had violated certain Federal Aviation Regulations ("FAR") and that,

³Section 1005(c) of the Federal Aviation Act of 1958, as amended, 49 USC§ 1485(c), provides that whenever service of an order of the Administrator is effected by certified mail, "the date of mailing shall be considered as the time when service is made." Contrary to the implication in the Administrator's brief, we do not think the existence of this provision on service by the Administrator relieves the Board of its obligation to assess the adequacy of service on an airman who, the parties agree, did not in fact receive the certified copy of the Administrator's order.

⁴The June 27, 1989 revocation order revoked respondent's airman certificate, effective July 18, and required his surrender of the certificate by that date.

as a result, his certificate should be revoked.⁵ However, the subsequently issued Order of Revocation, dated June 27, 1989 and sent to respondent by certified mail on June 28, was returned by the Postal Service to the Administrator on July 24 bearing the notations on its envelop that it was "Unclaimed" after attempts at delivery on July 1, 10, and 16. The Order of Revocation was remailed to respondent by regular mail on July 25, and, according to the Administrator, that copy of the order was not returned.

The law judge, citing Administrator v. Hamilton, NTSB Order No. EA-2743 (1988), ruled that respondent had had valid constructive service of the revocation order and that his failure to file an appeal within 20 days after the July 25 mailing required the dismissal of his appeal as untimely.⁶ While respondent appears to accept the proposition that constructive service of the Administrator's revocation order on him would be sufficient under Board precedent, he does not agree that the all of the elements of such service were adequately established. Although we think they were, we think respondent's disagreement

⁵The Proposed Notice of Certificate Action, as well as the Order of Revocation issued about a month later, alleged a belief that respondent had violated FAR sections 61.3(c), 135.293(a) and (b), 135.299 and 135.343, 14 CFR Parts 61 and 135 (1989).

⁶The law judge mistakenly indicates that a 20-day filing period computed from July 25 would end on August 11. By our calculation, the deadline based on that date would be August 14. At the same time, we do not mean to suggest that it would have been error to compute the deadline from the date of service of the certified copy of the revocation order, in which case the respondent would have had until July 18 to file his appeal with the Board.

reveals some mistaken assumptions over the nature of the Administrator's evidentiary burden respecting the question of service.

Respondent's appeal in effect proceeds on the premise that the Administrator was somehow obligated to prove that the Postal Service in fact discharged its duty to attempt to deliver the certified mail containing the revocation order to the respondent before returning it as unclaimed. He thus takes issue, for example, with the adequacy of the Administrator's showing that the Postal Service left three notices in respondent's mail box advising him that it had certified mail for him, as the notations on the envelop of the returned revocation order reflect. We see no merit in the respondent's position. Rather, we think the Administrator's evidence in this connection, supported by the sworn declaration of the FAA employee who received the returned revocation order and remailed it by regular mail, was more than sufficient to create at least a rebuttable presumption that respondent had neglected to collect his certified mail despite the Postal Service's thrice repeated efforts to deliver it or apprise him of its existence. Consistent with this analysis of the matter, the dispositive question, at least as to the adequacy of service of the certified copy of the revocation order on respondent, becomes whether the respondent successfully demonstrated that he had not received any notices concerning the certified mail he did not claim. This, he clearly did not do.

In a carefully worded affidavit, respondent undertakes to create the inference that any certified mail notifications, as well as, presumably, the copy of the revocation order sent to him by regular mail on July 25, that may have been delivered to his mail box prior to a change of residence he made in September, 1989, likely fell prey to mail thieves or vandals. However, notwithstanding any ongoing mail theft problem respondent may have been experiencing, his affidavit does not expressly deny that he received either postal notifications in July concerning what may have been attempts to deliver the June 28 certified mail to him or the copy of the revocation order mailed to him by regular mail on July 25.⁷ In fact, the only mail respondent in his affidavit specifically denies receiving is a September 11, 1989 follow-up letter, sent to him by both certified and regular mail, that noted, among other things, his failure to surrender his airman certificate pursuant to the July 18 effective date of the June 27 revocation order.⁸ A subsequent follow-up letter,

⁷Respondent asserts in his affidavit that he did not refuse to accept a certified letter from the FAA, an apparent reference to the law judge's statement in her order that "[i]f a pilot refuses to claim certified mail sent to his address of record, he must accept the consequences of his inaction." Notwithstanding the law judge's use of the term "refuse," it is not necessary, in order to show valid constructive service, to establish why the addressee of certified mail did not claim it after notification, it is enough to show that it was not claimed. It is also of no consequence whether the addressee is aware of the identity of the sender of the certified mail about which he has been notified.

⁸This mail, also returned to the Administrator, was not received by respondent because he had moved without leaving a forwarding address with the Postal Service or notifying the

dated September 25, also containing a brief history of the matter and again enclosing a copy of the June 27 revocation order, was sent to respondent's employer's address and was received by him there. It seems to us that absent an unequivocal denial by respondent of his receipt of any postal notices during July⁹ and of the July 25 remailing of the revocation order, his challenge to the law judge's determination that he had valid constructive service of the revocation order must be rejected.¹⁰ His appeal to the Board from the law judge's dismissal of his appeal from the Administrator's revocation order will, therefore, be denied.¹¹

(..continued)
Administrator of an address change.

⁹In what could be construed as an effort to confuse readers of his affidavit into believing that respondent did not receive any postal notices relating to the copy of the June 27 revocation order sent to him by certified mail on June 28, respondent avers, as to the September 11 letter, that "I have no knowledge of the three notices." However, since the Postal Service did not have an address for respondent when it attempted to deliver the September 11 certified and regular mail letters, there is no indication in the record that any notices were left with regard to that mailing.

¹⁰Although respondent filed his appeal within 20 days after receiving the September 25 correspondence, we agree with the Administrator that respondent had been constructively served three months earlier. We also agree with the Administrator that, contrary to the law judge's comments concerning Section 821.30(a), the Board has jurisdiction to entertain late-filed appeals.

¹¹While respondent in his affidavit asserts that the September 25 letter was his "first notice of the revocation", it is not clear whether he is asserting that he had not earlier received a copy of the June 27 order itself or, more likely, that he did not before receiving that letter understand that his certificate had in fact been revoked since July 18. Technically, he had not previously been advised of that circumstance. In either case, we do not interpret the statement as a denial of

We think, in closing, that a few comments are necessary to dispel any perception that the application of constructive service principles is inequitable or inappropriate in the circumstances of this case. In this connection, respondent concedes receipt in early May, 1989 of the Administrator's proposed revocation of his commercial pilot certificate for certain alleged FAR infractions. Respondent therefore knew, from advice contained in the April 26 Notice of Proposed Certificate Action, that a revocation order could issue in as few as 15 days.

Respondent also knew that the reliability of mail service to his home address had been in the past and could be in the future undermined by pilferage. Nevertheless, respondent appears not only to have taken no steps to minimize the possibility that further communications from the Administrator concerning the matter would not get to him or to have made any inquiries of the Administrator as to the status of the case in the several months following the April 26 Notice, he also appears to have moved without undertaking to ensure that documents relevant to the case would be promptly forwarded to him. Because we believe that this history is not consistent with the course of action a prudent airman would follow to protect threatened certificate rights, it is difficult not to view respondent's tardiness in filing an appeal with the Board as either the direct result of a lack of

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receiving postal notices that may have related to the certified copy of the June 27 revocation order that was returned to the Administrator "Unclaimed."

diligence in monitoring a matter of presumably vital interest to him or the product of a mistaken judgment that avoiding or eluding information on the progress of the proceeding might somehow benefit him. In any event, we perceive nothing in the record that would justify accepting respondent's notice of appeal out of time.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied, and
2. The February 21, 1989 order of the law judge dismissing the respondent's appeal is affirmed.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.